

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

FIBER TECHNOLOGIES NETWORK, L.L.C.

Petition dated January 30, 2003 for Preemption Pursuant to)
Section 253 of the Communications Act.)

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Docket No. 03-37

Reply Comments of Borough of Blawnox

Frederick A. Polner, Esquire
Rothman Gordon, P.C.
300 Grant Building
Pittsburgh, PA 15219
(412) 338-1100

Dated: April 14, 2003

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| Section 253 of the Communications Act. |) | |

REPLY COMMENTS OF BOROUGH OF BLAWNOX

AND NOW COMES Borough of Blawnox, Pennsylvania, by and through its counsel Frederick A. Polner, Esquire and Rothman Gordon, P.C. and files this its REPLY COMMENTS in the above-captioned matter. In support whereof, the following is averred:

INTRODUCTION

On February 13, 2003, the Commission released a public notice soliciting comments in the above-captioned petition for preemption filed by Fiber Technologies Networks, L.L.C. (Fibertech). The original pleading cycle set forth in that Public Notice that reply comments were due April 1, 2003. On March 4, 2003, the National Association of Telecommunications Officers and Advisors (NATOA) filed a petition seeking an extension of the deadlines to file comments and reply comments on the Fibertech petition. The NATOA petition was granted. By Order, released on March 7, 2003, the deadline to file reply comments was extended until April 15, 2003.

DISCUSSION

Borough of Blawnox filed its Comments on March 31, 2003. In its Comments, the Borough argues, *inter alia*, (1) that the Commission is without authority to grant the relief requested by Fibertech; (2) Fibertech has failed to meet its burden of proof; (3) the rights of way ordinance in question does not violate Section 253(a); (4) the rights of way ordinance in question is within the Section 253(b) safe harbor; (5) the rights of way ordinance in question is within the Section 253(c) safe harbor; and (6) the Commission is not the proper forum to interpret Pennsylvania state law.

Upon close scrutiny of the Fibertech Petition and the other Comments filed in the captioned matter, it appears each of the arguments advocated by the Borough remain cogent and fully meritorious.¹

Moreover, should the Commission preempt the enforcement of the Borough's rights-of-way ordinance in the captioned proceeding, such preemption would violate the Administrative Procedure Act, 5 USC § 551, *et. seq.* (the "APA") and fundamental rights of fairness and due process. The captioned proceeding was initiated upon a petition filed by Fibertech. Yet, it is the Borough which is being placed in the position of having to defend itself.² Allegations, contentions and assertions have been made in the petition, as well as in Comments filed by others in this proceeding. The Borough, however, is not given the opportunity to cross-examine, probe or test such allegations, contentions and assertions. Worse, Fibertech has indicated an

¹ In footnote 20 of its Comments, the Borough references a City of Denver, Colorado Ordinance charging all providers \$2.84 per linear foot. The jurisdictional authority of Denver to impose this fee was preempted by a Colorado state court, but the reasonableness of the fee was not at issue. City of Denver v. Qwest 18 P.3d 748 (Supreme Court of Colorado, 2001).

² Although the Borough is the nominal party, it is the residents of the Borough who will be made to suffer and be placed at risk if the local government ordinance enacted for their benefit is impaired.

intent to file Reply Comments;³ and, there too, the Borough will be unable to cross-examine, probe or test the allegations, contentions and assertions should Fibertech file Reply Comments.

CONCLUSION

The Commission has no choice but to deny the relief requested by Fibertech.

Respectfully Submitted,

Frederick A. Polner, Esquire
Rothman Gordon, P.C.
300 Grant Building
Pittsburgh, PA 15219
(412) 338-1100
Counsel to Borough of Blawnox, Pennsylvania

Dated: April 14, 2003

³ See Fibertech Motion, dated April 11, 2003.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Reply Comments of Borough of Blawnox was sent via first class mail, postage prepaid, on the _____th day of April, 2003, to the following individuals:

Charles B. Stockdale, Esquire
Robert Witthauer, Esquire
Fibertech Networks
140 Allen's Creek Road
Rochester, N.Y. 14618

Matt Middlebrooks, Jr., Esq.
Qwest Communications International, Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Stephen C. Garavito, Esquire
One AT&T Way
Room 3A250
Bedminster, NJ 07921

Richard Juhnke, Esq.
401 Ninth Street, N.W.
Suite 400
Washington, D.C. 20004

Kenneth S. Fellman, Esq.
Kissinger & Fellman, P.C.
Ptarmigan Place, Suite 900
3773 Cherry Creek N. Drive
Denver, Colorado 80209

Adrian E. Herbst, Esq.
The Baller Herbst Law Group P.C.
953E Grain Exchange Building
400 South Fourth Street
Minneapolis, Minnesota 55415

Thomas Jones, Esq.
Wilkie Farr & Gallagher
1875 K Street N.W.
Washington, D.C. 20006

Frederick A. Polner, Esquire